

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FIRST SEALORD SURETY, INC.,
Plaintiff,

v.

DURKIN & DEVRIES INSURANCE AGENCY,
LLC,
Defendant.

No. 2:10-cv-00832-TON

**SUPPLEMENTAL DECLARATION OF ROBERT G. BARBOUR
IN OPPOSITION TO DURKIN & DEVRIES INSURANCE AGENCY, LLC'S
MOTION TO DISMISS (Doc. 40)**

I, ROBERT G. BARBOUR, declare:

I am an attorney-at-law admitted *pro hac vice* to practice before this Court. I am a Partner with the law firm of Watt, Tieder, Hoffar & Fitzgerald, L.L.P., attorneys for Plaintiff First Sealord Surety, Inc. ("First Sealord"). Unless otherwise stated, I have personal knowledge of the following facts, and if called and sworn as a witness, could and would competently testify thereto.

1. This Supplemental Declaration is being submitted in opposition to Durkin & DeVries Insurance Agency, LLC's ("Durkin & DeVries") Motion to Dismiss (Doc. 40).

2. On July 11, 2012, Durkin & DeVries filed its Motion to Dismiss Count One of First Sealord's First Amended Complaint (Doc. 40).

3. Pursuant to the Court's Order Setting Briefing Schedule (Doc. 45), First Sealord filed its Opposition to Durkin & DeVries' Motion to Dismiss (Doc. 46), on August 16, 2012.

4. Count One of First Sealord's First Amended Complaint (Doc. 34-3) asserts a claim against Durkin & DeVries for Negligent Misrepresentation for making material

misrepresentation on First Sealord's Agency Questionnaire which were relied upon in connection with Durkin & DeVries' appointment as First Sealord's agent.

5. Durkin & DeVries' Motion to Dismiss argues that the negligent misrepresentation claim should be dismissed because First Sealord cannot show that Durkin & DeVries' misrepresentations proximately caused First Sealord's claimed damages.

6. Durkin & DeVries filed its Motion to Dismiss, however, before it deposed First Sealord's Corporate Representative, Christopher Mucchetti regarding the facts and circumstances surrounding the negligent misrepresentation claim, which took place, by mutual agreement of the parties, on September 13, 2012. A copy of the Second Notice of Deposition is attached as Exhibit A.

7. Likewise, First Sealord's Opposition to the Motion to Dismiss was filed prior to Mr. Mucchetti's deposition.

8. Attached as Exhibit B are the relevant portions of Mr. Mucchetti's deposition wherein he testified regarding the issue of proximate cause raised in Durkin & DeVries' Motion to Dismiss, specifically as it relates to how Durkin & DeVries' misrepresentations on the Agency Questionnaire were a substantial factor in the issuance of the bonds that ultimately led to losses incurred by First Sealord.

/s/ Robert G. Barbour
ROBERT G. BARBOUR

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2012, I caused a true and correct copy of the foregoing Supplemental Declaration of Robert G. Barbour, Esq., with exhibits, to be served upon the following via e-mail and through the cm/ecf system:

Christopher E. Torkelson
Marshall D. Bilder
Sterns & Weinroth
50 West State Street, Suite 1400
Trenton, NJ 08607-1298
Counsel of Record for Defendant

/s/Robert G. Barbour
Robert G. Barbour, Esq.
Brian N. Krulick, Esq.
Kevin J. McKeon, Esq.
WATT, TIEDER, HOFFAR
& FITZGERALD, L.L.P
8405 Greensboro Drive, Suite 100
McLean, Virginia 22102
(703) 749-1000
*Counsel for Plaintiff,
First Seabord Surety, Inc.*

EXHIBIT A

STERNS & WEINROTH

A Professional Corporation

50 West State Street, Suite 1400

Trenton, NJ 08607-1298

Telephone: (609) 392-2100

Facsimile: (609) 392-7956

Attorneys for Defendant/Third Party Plaintiff, Durkin & DeVries Insurance Agency, LLC n/k/a
Durkin & Durkin Insurance Agency, LLC

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FIRST SEALORD SURETY, INC.,

Plaintiff,

v.

DURKIN & DEVRIES INSURANCE
AGENCY, LLC,

Defendant/Third Party Plaintiff,

v.

HELLER & SMITH CORPORATION,

Third Party Defendant.

Civil Action No.: 2:10-cv-00832-TON

**SECOND NOTICE OF DEPOSITION
PURSUANT TO FED.R.CIV.PROC. 30(b)(6)
DIRECTED TO FIRST SEALORD SURETY,
INC.**

TO: Robert G. Barbour, Esq.
Brian N. Krulick, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
8405 Greensboro Drive, Suite 100
McLean, Virginia 22102
Attorneys for Plaintiff, First Sealord Surety, Inc.

PLEASE TAKE NOTICE that Defendant/Third Party Plaintiff, Durkin & DeVries Insurance Agency, LLC n/k/a Durkin & Durkin Insurance Agency, LLC ("Durkin"), pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, will take the deposition of the following person(s) on August 23, 2012, beginning at 10:00 a.m. and continuing from day to day thereafter

until completed:

The designated representative(s) of New First Sealord Surety, Inc. ("First Sealord") having the most knowledge regarding the matters addressed in the plaintiff's First Amended Complaint, including without limitation the following specific topics:

- (i) the factual basis for the allegations contained in First Sealord's First Amended Complaint in this matter;
- (ii) whether First Sealord was aware that Durkin had done business with St. Paul in the 5 years preceding the time when First Sealord engaged Durkin.
- (iii) the Agency Agreement between First Sealord and Durkin;
- (iv) the Agency Questionnaire completed by Durkin;
- (v) all investigation(s), analysis, and decisions undertaken or made by First Sealord regarding the appointment of Durkin as First Sealord's agent for the purpose of soliciting business for First Sealord's surety bond products;
- (vi) any and all prospective agents that First Sealord declined to appoint as agents based upon the agent's responses to the Agency Questionnaire;
- (vii) any and all agents terminated by First Sealord based upon the agent's dealings with another insurance carrier;
- (viii) any and all prospective and/or agents of First Sealord who disclosed claims concerning unauthorized bonds;
- (ix) First Sealord's policies and procedures regarding the appointment of agents for the purpose of soliciting business for First Sealord's surety bond products;
- (x) First Sealord's policies and procedures regarding the termination of appointed agents;
- (xi) First Sealord's policies and procedures regarding monitoring and/or due diligence concerning appointed agents;
- (xii) First Sealord's gross revenues and profits relating to all business solicited by Durkin as agent for First Sealord;
- (xiii) First Sealord's complete agency file relating to Durkin; and
- (xiv) damages alleged to be suffered by First Sealord relating to its appointment of Durkin as its agent.

Said representative(s) shall also be examined and be prepared to testify about: First Sealord's initial disclosures, discovery responses and documents produced in response to the Durkin's discovery requests.

The said depositions will be taken at the offices of Stradley, Ronan, Stevens & Young, LLP,

2005 Market Street, Suite 2600, Philadelphia, Pennsylvania, or at a mutually convenient location within the Eastern District of Pennsylvania to be agreed upon by counsel, before an officer authorized by law to administer oaths. Each deponent is requested to produce and permit inspection and copying of all documents in his or her possession, including but not limited to personal files, corporate records, documents, and correspondence, which relate to or refer to the topics identified herein, as well as all documents responsive to defendant's prior discovery requests and that have not previously been produced in discovery. Said documents shall be produced at the offices of Sterns & Weinroth, 50 W. State Street, Suite 1400, Trenton, New Jersey 08608, five (5) business days before the date of the deposition.

STERNS & WEINROTH

A Professional Corporation
Attorneys for Defendant/Third Party
Plaintiff, Durkin & DeVries Insurance
Agency, LLC n/k/a Durkin & Durkin
Insurance Agency, LLC

/s/ Christopher E. Torkelson

Christopher E. Torkelson

Dated: July 31, 2012

CERTIFICATE OF SERVICE

I, Christopher E. Torkelson, Esq., hereby certify that the foregoing Notice of Deposition was served on July 31, 2012, via e-mail and ordinary mail, upon:

Robert G. Barbour, Esq.
Brian N. Krulick, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
8405 Greensboro Drive, Suite 100
McLean, Virginia 22102
Attorneys for Plaintiff, First Sealord Surety, Inc.

/s/ Christopher E. Torkelson
Christopher E. Torkelson

Dated: July 31, 2012

EXHIBIT B

CHRISTOPHER MUCCHETTI
FIRST SEALORD vs. DURKIN & DEVRIES

September 13, 2012

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF PENNSYLVANIA
3 CIVIL ACTION NO. 2:10-CV-00832-TON

4 FIRST SEALORD SURETY, INC.,

5 Plaintiff,

6 v.

7 DURKIN & DEVRIES INSURANCE
8 AGENCY, LLC,

9 Defendant/Third-Party Plaintiff,

10 v.

11 HELLER & SMITH CORPORATION,

12 Third-Party Defendant.
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DEPOSITION UNDER ORAL EXAMINATION OF

CHRISTOPHER MUCCHETTI

DATE: SEPTEMBER 13, 2012

REPORTED BY: CHARLENE FRIEDMAN, CCR, RPR, CRR

ESQUIRE DEPOSITION SOLUTIONS
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1 state, but licenses would have to get renewed
2 on a periodic basis.

3 Q During the course of an agent's
4 appointment by First Sealord, for what
5 reasons would an underwriter refer back to
6 the agency file?

7 A Off the top of my head, there's --
8 well, I mean, if they got some information,
9 you know, maybe someone wanted to be removed
10 from a power just to see what was going on,
11 but I don't think there would be a whole lot
12 of situations where that would happen.

13 Q Would an underwriter ever refer to
14 the agency file as part of the underwriter's
15 process in considering a specific bond
16 request?

17 A I would say no, but it would set
18 the foundation for -- after the appointment
19 process, you know, everything that has led up
20 to that appointment is part of the
21 underwriting process, so to speak.

22 Q Once the agent has been appointed
23 though, every bond request is considered by
24 the underwriter based on the individual bond
25 request.

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1 Is that right?

2 MR. KRULICK: Object to form.

3 Q The underwriter never goes back to
4 double check the agency answer when it gets a
5 bond request, does it?

6 MR. KRULICK: Object to form.

7 A Not to my knowledge.

8 Q Although you don't have any direct
9 knowledge, are you generally aware that at
10 some point in time bonds issued to Heller &
11 Smith went into claims?

12 A Yes.

13 Q Okay. You're at least aware that's
14 an allegation in the case, right?

15 A Yes.

16 Q Do you know why the Heller & Smith
17 bonds went into claims?

18 A I don't.

19 Q Do you know when the Heller & Smith
20 bonds went into claims?

21 A I don't.

22 Q Did Durkin's responses on the
23 agency questionnaire, how Durkin answered any
24 of the questions on the agency questionnaire,
25 did that influence, did that affect whether

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1 or not the bonds issued to Heller & Smith
2 several years later went into claims?

3 MR. KRULICK: Object to form.

4 A I don't think there's a direct
5 effect, but that's part of the process.

6 Q How is it part of the process?

7 A Well, because when we get the
8 information back, for example, the agency
9 history questions, we're relying on the
10 accuracy of those questions in appointing the
11 agent.

12 Q But after that agent is appointed,
13 you just testified a few minutes ago the
14 underwriter wouldn't ever go back to the
15 agency questionnaire considering a bond
16 request.

17 MR. KRULICK: Object to form.

18 A I understand that, but if -- if the
19 history and -- and -- what we're being told,
20 we have looked at as an exhibit, the cover
21 letter that came in that pointed out some
22 longevity with the account, bonded since its
23 inception, so if the accuracy of the
24 information is not there, then it affects --

25 Q Go ahead.

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1 have wrote the bond.

2 Q I understand that. I'm asking you
3 a different question. I just want to make
4 sure you understand my question, all right?

5 Did the way that Durkin answered
6 any of the questions in the questionnaire
7 cause Heller & Smith to experience financial
8 difficulties?

9 MR. KRULICK: Object to form.

10 A Not that I'm aware of.

11 Q Did any of Durkin's answers in the
12 agency questionnaire cause Heller & Smith to
13 experience cash flow problems?

14 MR. KRULICK: Object to form.

15 A Not that I'm aware of.

16 Q Did any of Durkin's answers in the
17 questionnaire cause the bond issued to Heller
18 & Smith on any job to result -- to cause any
19 supplier to assert a claim on a bond because
20 he hadn't been paid?

21 MR. KRULICK: Object to form.

22 A Not that I'm aware of.

23 Q So aside from the fact that Durkin
24 was the agent, whether or not a specific bond
25 went into claims or not didn't actually have

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1 anything to do with Durkin's answers to
2 questions on the questionnaire, did it?

3 MR. KRULICK: Object to form.

4 A Again, I would say that there was
5 some -- there would be an indirect
6 correlation because of --

7 Q How is it -- I want you to tell me
8 exactly how is it that Durkin's answer to
9 question Number 17, on the agency
10 questionnaire about powers of attorney, how
11 is it that Durkin's answer to that, no matter
12 what the answer was, by the way, no matter
13 what the answer was, how did that cause the
14 Middleboro bond to go into claims?

15 A From what I said before. If he
16 checked off yes to having his powers revoked,
17 we wouldn't have appointed him. That bond
18 never would have been issued. So it never
19 would have went into claim.

20 Q If his answer to that question was
21 no, right? And as a matter of fact, his
22 power of attorney never had been revoked, so
23 it's a truthful answer.

24 All right. How would his truthful
25 answer to that question of no have caused the

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1 deferred to Heller & Smith?

2 A I'm not aware of them, but it
3 doesn't mean they don't exist.

4 Q Is it your understanding that every
5 single bond that First Sealord issued to
6 principals represented by Durkin or brought
7 to the company by Durkin went into claims and
8 incurred losses?

9 A I'm sorry?

10 Q Is it your understanding every
11 single bond First Sealord issued to a
12 principal brought to you by Durkin, every
13 single bond went into claims and resulted in
14 losses?

15 A No, it's not.

16 Q Okay. Or Durkin's responses to the
17 agency questionnaire, true or not, any other
18 responses, were they a factor in the bonds
19 that didn't result in losses being successful
20 bonds?

21 A They are from the respect of
22 whether they're true or not.

23 Q So it's impossible to predict,
24 based on Durkin's answers to the agency
25 questionnaire, whether or not a particular

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1 Q If they were cancelled by First
2 Sealord and also if -- well, now that we've
3 seen one example of why an agency might
4 affirmatively answer one of these questions
5 that are such an issue in Durkin's case, now
6 that we've seen -- well, sometimes an
7 explanation is satisfactory.

8 Are there other explanations that
9 might be satisfactory to an affirmative
10 response on an agency questionnaire?

11 A I think it was --

12 MR. KRULICK: Object to form.

13 A I think it would depend on the
14 question.

15 Q Depends on the question, depends on
16 the circumstances of the case, right?

17 A Yes.

18 Q Okay. So the simple yes or no is
19 not by itself on any of these questions, it's
20 not by itself disqualifying, it depends on
21 the explanation?

22 MR. KRULICK: Object to form.

23 A I think it depends on the question.

24 Q On the question?

25 A Well, yes. And to me, you know, a

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1 cancellation, the unauthorized bond portion
2 or bond question to me is more concerning
3 than a cancellation for that reason.

4 Q Because it's totally unacceptable
5 for an agent to issue a bond without
6 authorization, right?

7 A Well, it's unacceptable from the
8 standpoint that it lays -- that it sets the
9 table for everything that comes after the
10 fact from that agent from an account
11 standpoint. You know, there's -- I think
12 what I had said before, they are -- you know,
13 they're an appointed agent. It's not a
14 willy-nilly, you know, throw it against the
15 wall and see who can get us business. You
16 know, you go after agents that know the
17 business, that in some cases have
18 designations and go through the continuing
19 education. Some of that is not related to
20 surety, so we're relying on the truthfulness.

21 Q Question 18 asks whether the agency
22 has ever been involved in litigation or
23 claims concerning unauthorized bonds.

24 Is that right?

25 A Yes, 18.

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1 Q Okay. So the explanation is
2 important, correct?

3 A Correct.

4 Q And First Sealord never got an
5 explanation.

6 Isn't that correct?

7 A Correct.

8 Q So First Sealord was never in a
9 position to determine whether or not what
10 Durkin & Devries' relationship with -- strike
11 that.

12 Is the truthfulness of an agent
13 important?

14 A Important in what regard?

15 Q Generally speaking, is the
16 truthfulness of an agent important -- an
17 important quality that a surety looks at when
18 appointing them an agent?

19 A Yes, I think it is.

20 Q If you know that they are
21 untruthful, would you ever appoint them?

22 A No.

23 Q The process by which First Sealord
24 issued bonds was such that First Sealord
25 itself did not directly issue any of the

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1 bonds.

2 Is that correct?

3 A Correct.

4 MR. TORKELSON: Objection to the
5 form. Go ahead.

6 A It did not.

7 Q Explain to me what the process was
8 for a bond to be issued.

9 A After it was submitted, it would go
10 through an approval process. The system
11 would generate a bond number and then the
12 field underwriter would go back to the agent
13 with the approval and would give them the
14 bond number.

15 Q Okay. And who would issue the
16 bond?

17 A The agent would then in turn issue
18 the bond.

19 Q Because the agent has the power of
20 attorney.

21 Is that correct?

22 A Yes.

23 Q And the power of attorney gives a
24 lot of power, doesn't it?

25 A Yes, it gives them the ability to



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1 issue bonds.

2 Q If an agent can't be trusted with
3 that power of attorney or if an agent can't
4 be trusted, would you ever give them the
5 power of attorney to issue bonds?

6 A No.

7 Q And so each time that a bond is
8 issued, you have to be able to trust an
9 agent.

10 Is that correct?

11 A Right.

12 Q And part of trusting an agent is
13 trusting everything that that agent has told
14 you up until that point.

15 Is that correct?

16 MR. TORKELSON: Objection to the
17 form.

18 A Correct.

19 Q At any point in time, whether or
20 not there were any losses on any bonds, if
21 First Sealord discovered that Durkin &
22 Devries misrepresented the responses on the
23 agency questionnaire, as has been alleged in
24 this complaint with respect to its
25 relationship with St. Paul, and the fact that

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1 its powers of attorneys were revoked, it was
2 accused of issuing an unauthorized bond, what
3 would First Sealord have done?

4 MR. TORKELSON: Objection to the
5 form. Go ahead.

6 A Issued a termination.

7 Q Regardless of whether or not there
8 are any losses.

9 Is that correct?

10 A Yes.

11 Q And that's because the truthfulness
12 and the ability to trust an agent's responses
13 are important on the -- just as important on
14 the last day of the relationship as they are
15 on the first day of the relationship.

16 Is that correct?

17 A Correct.

18 Q Okay. And the truthfulness and the
19 ability to trust in the agent's response is a
20 factor that goes into the approval of every
21 bond that First Sealord approves for its
22 agents.

23 Is that correct?

24 A Correct.

25 Q Okay. And because if it's

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1 discovered that the agent is untruthful, it's
2 immediately terminated, would you say it's a
3 substantial factor?

4 MR. TORKELSON: Objection to the
5 form.

6 Q Would you say that the agent's
7 truthfulness is a substantial factor in First
8 Sealord's decision to approve a bond?

9 MR. TORKELSON: Objection to the
10 form.

11 A Yes.

12 Q Just to clarify here, as the
13 corporate representative that has been
14 appointed by First Sealord at this deposition
15 with respect to the facts and circumstances
16 regarding Durkin & Devries' relationship with
17 St. Paul, you've testified that the only
18 information you're aware of is that which
19 you've got from lawyers and the allegations
20 and whatever is in the first amended
21 complaint.

22 Is that correct?

23 MR. TORKELSON: Objection to the
24 form.

25 A Correct.

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1 Q And as the corporate representative
2 of First Sealord, you stand -- do you stand
3 by the allegations and assertions made in the
4 first amended complaint?

5 MR. TORKELSON: Objection to the
6 form.

7 A Yes.

8 Q Okay. And because of the fact that
9 Durkin & Devries never disclosed its
10 relationship to First Sealord, there's no way
11 for anybody at First Sealord to know
12 firsthand the facts, the specific facts
13 regarding Durkin & Devries' relationship with
14 St. Paul.

15 Is that correct?

16 MR. TORKELSON: Objection.

17 A Yes.

18 Q So who would be the best source of
19 information for -- regarding Durkin &
20 Devries' relationship with St. Paul,
21 generally speaking?

22 If you wanted to know something
23 about the relationship between Durkin &
24 Devries and St. Paul, who would you ask?

25 A Durkin & Devries.

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1 Q Anybody else?

2 A You could ask St. Paul.

3 Q Okay. First Sealord would not have
4 knowledge regarding Durkin's relationship
5 with St. Paul, correct?

6 A Yes.

7 Q Especially if Durkin & Devries
8 didn't tell you about it.

9 Is that correct?

10 A Correct.

11 Q So if there were letters written by
12 St. Paul and by Durkin & Devries regarding
13 St. Paul and Durkin & Devries' relationship,
14 who would be the best people to testify on
15 that regard?

16 MR. TORKELSON: Objection to the
17 form.

18 A Either Durkin or St. Paul.

19 MR. KRULICK: Okay.

20 I don't have any further questions.

21 CONTINUED EXAMINATION BY MR. TORKELSON:

22 Q I just have a couple.

23 Mr. Krulick asked you if Durkin &
24 Devries had put on its agency questionnaire
25 \$78 million in losses in 2004, whether that

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1 Q Okay. And would the fact that it's
2 another agent that went through the
3 appointment process and for all intents and
4 purposes was a perfectly qualified agent, no
5 problems with that agent, would that be
6 predictive of whether or not Heller & Smith
7 bonds, through that agent, would go into
8 claims or not?

9 MR. KRULICK: Object to form.

10 A No, but we would have been able to
11 rely on the accuracy of the information on
12 the agency questionnaire.

13 Q But it doesn't have any impact.
14 It's not a factor at all whether the Heller &
15 Smith bond issued through that other agent,
16 succeed or fail?

17 A It does from the standpoint of
18 trusting the information.

19 Q I'm not talking about trusting the
20 information. I'm talking about whether the
21 bond succeeds or fails, whether there are
22 claims made against the bond.

23 If it comes through another agent
24 who's perfectly trustworthy, does that make
25 any difference in whether those bonds succeed